SUMMARY

2015/8 No obligation on employer to set aside a disabled employee’s final warning for sickness absence (UK)

<p>In a case involving recurrent sickness absence that was unlikely to improve, the Employment Appeal Tribunal (‘EAT’) has overturned findings of unfair dismissal and disability discrimination based on failure to make reasonable adjustments.</p>

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Background

The duty to make reasonable adjustments, unique to the protected characteristic of disability, is set out in section 20(3) of the Equality Act 2010, which provides:

"Where A's provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, A must take such steps as it is reasonable to have to take to avoid the disadvantage".

If an employer knows (or ought reasonably to know) that a person has a disability and there is a provision, criterion or practice (PCP) which places them at a substantial disadvantage compared to those who are not disabled, they have a duty to make reasonable adjustments. Failure to do so amounts to discrimination.

This case involves an employee of the local authority, the London Borough of Lambeth ('Lambeth'), who had taken a lot of sick leave. Lambeth's sickness policy was to disregard periods of absence relating to a disability. The trigger point for formal action as a result of *other sick leave* was four periods of sickness, or a total of 10 days sickness in a rolling 12 month period.

Facts

Mr Carranza worked for Lambeth before being transferred by a transfer of an undertaking to General Dynamics Information Technology Ltd ('General Dynamics'). He suffered from abdominal adhesions; a condition which Lambeth accepted was a disability. In addition to his disability-related absence, Mr Carranza had enough sickness absences to trigger Lambeth to take formal action. He received a warning, and a final written warning shortly before he was transferred to General Dynamics, having accrued absences of more than 41 weeks over a 3 year period (of which nearly 37 were disability-related).

Mr Carranza, following this, had two further short disability-related absences, before suffering a shoulder injury which resulted in three months' absence (which again triggered the formal procedure and a hearing). Acting on advice from occupational health, the employer took into account that although the shoulder injury was temporary, the adhesions were likely to lead to similar patterns of attendance as they were a lifelong problem. They dismissed Mr Carranza following the hearing, and he subsequently brought two separate claims; one for disability discrimination and the other for unfair dismissal[1].

The Employment Tribunal, hearing the claims together, found by a majority that the employer had failed to make reasonable adjustments. It found that the PCP was a requirement for consistent attendance at work, which put Mr Carrenza at a substantial disadvantage. The Tribunal thought that it would have been a reasonable adjustment to disregard the final written warning. Mr Carranza's unfair dismissal claim was also upheld for the same reason. The Tribunal held that a reasonable employer in these circumstances would have looked in more detail at the context of the warning, rather than taking it at face value.

Judgment

The EAT overturned the Employment Tribunal's findings on both claims[2].

Failure to make reasonable adjustments

The EAT stated that it can be challenging to analyse a claim arising from a dismissal for poor attendance as a claim for failure to make reasonable adjustments.

The PCP in this case did not pose a problem. The EAT agreed with the tribunal's finding that the PCP was a requirement for consistent attendance at work. There was no difficulty here in finding a disadvantage based upon this PCP. The employment appeal tribunal had correctly concluded that Mr Carranza's substantial absence coupled with the taking of occupational health's advice that the absence would continue was such that the respondent was entitled to dismiss him. Therefore, there were clearly no adverse effects from taking occupational health's advice. Mr Carranza based his claim for disability discrimination on the fact that he felt Lambeth had failed to make reasonable adjustments by not disregarding the final written warning.

The issue was in identifying the "step" which it was reasonable for the employer to have to take to avoid the disadvantage. The EAT held that the employer had not failed to make reasonable adjustments for the disability as it had not been required to take the step of disregarding the final written warning in relation to Mr Carranza's absences. The EAT stated that the Employment Tribunal had set out no substantial basis for saying it would be reasonable to disregard the final warning. The fact that the employer had refrained from dismissing Mr Carranza for two short disability-related absences following the final written warning gave no basis for saying that disregarding it altogether would have been an appropriate step.

Unfair dismissal

The finding of unfair dismissal was set aside by the EAT, as the employer had not been required to revisit the final warning. The EAT referred to the 2013 Court of Appeal case of *Davies - v - Sandwell Metropolitan Borough Council* here, which states that there is a limit to the extent to which an employer can be expected to revisit something which took place at an earlier stage of the dismissal process – unless an earlier warning was issued in bad faith, was manifestly improper or was issued without any *prima facie* grounds. It could not possibly have been said here that the final written warning had been issued in bad faith, or that there had been no *prima facie* grounds for doing so, or that it had been manifestly inappropriate to issue it. The Employment Tribunal had therefore erred in finding that the employer either was or might have been required to discount wholly or in part the final written warning.

Commentary

UK law does not positively require employers to disregard periods of absence relating to a disability when considering whether to dismiss someone for lack of capability. In this sense, Lambeth might have been going beyond what the law required. However, the law does require the employer to make 'reasonable adjustments', if a PCP puts the disabled individual at a

substantial disadvantage in comparison to non-disabled persons. What is 'reasonable' will depend upon the circumstances of the case.

Cases such as this one, which involve a dismissal for poor attendance may be better considered as claims for discrimination arising from disability or indirect disability discrimination, rather than failure to make adjustments. The EAT appears to be trying to encourage this here, and it is an example of the EAT taking a narrow view of the scope of reasonable adjustments claims in relation to sickness absence procedures and dismissals.

In cases like this where an employer's sickness procedure makes particular provision to discount disability-related absence, it may also be easier to show disadvantage based on a PCP of "consistent attendance at work", rather than one based on the employer's absence management procedure.

This case can also act as a reminder that employers will not be required to re-open a written warning unless there are exceptional circumstances for doing so.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Had this case come before a Dutch court, I expect that a crucial point of debate would have been what the exact reason for the dismissal was. Was it that Mr Carranza had been absent for three months for a reason (shoulder injury) that was not related to his disability? In that case surely there would not have been a PCP that placed him at a substantial disadvantage. Or was the reason for the dismissal occupational health's advice that the adhesions were likely to lead to lifelong attendance problems? In that case he would have been dismissed because of his disability and he could have based his claim on direct disability discrimination without having to resort to claiming breach of the employer's duty to make reasonable adjustments.

Did Lambeth's policy to disregard periods of absence relating to a disability really go beyond what the law required? I would think that not disregarding such periods would be indirectly discriminatory and not justified.

As an aside, Dutch readers will be surprised to learn that in Lambeth an absence of ten days is enough to get one dismissed. Such a harsh policy would be unthinkable in the Netherlands. Dismissing an employee during sickness is even harder than dismissal normally is and dismissal for repeated sickness absence is also difficult.

Footnotes

1 It is not known what remedies Mr Carranza sought but it is likely that he asked the tribunal to award him financial compensation. Compensation for discrimination is unlimited and can include an amount for injury to feelings. Discrimination claims can result in high claims, for example for loss of future earnings. Unfair dismissal claims cannot result in awards exceeding the statutory cap, which currently stands at £ 78,355 or 52 weeks' pay, whichever is lower.

2 The outcome of this case is not known, but most likely Mr Carranza went away empty-handed.

Subject: Disability discrimination

Parties: General Dynamics Information Technology Ltd - v - Mr A Carranza

Court: Employment Appeal Tribunal

Date: 10 October 2014

Case number: UKEAT/0107/14

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